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No. 91-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Carolina

BRIEF *AMICUS CURIAE* OF THE NORTHERN VIRGINIA CHAPTER OF THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PARKS, AND THE NORTHERN VIRGINIA BUILDING INDUSTRY ASSOCIATION, INC., IN SUPPORT OF THE PETITIONER, DAVID H. LUCAS

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BRIEF OF THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PARKS NORTHERN VIRGINIA CHAPTER, AND THE NORTHERN VIRGINIA BUILDING INDUSTRY ASSOCIATION, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER, DAVID H. LUCAS

INTEREST OF THE AMICI CURIAE

Pursuant to Supreme Court Rule 37, the Northern Virginia Building Industries Association, Inc. ("NVBIA"), and the Northern Virginia Chapter of the National

Association of Industrial and Office Parks, Inc. ("NAIOP"), submit this brief amicus curiae in support of the Petitioner, David H. Lucas. Written consent to the filing hereof has been granted by counsel for all parties, and copies of that consent have been lodged with the Clerk.

NAIOP is a trade association representing members who construct, develop and operate industrial and office parks. NVBIA is an association of construction and real estate development companies. As owners and developers of property who must conform to complex and detailed schemes for the management of land use, the members of both associations are daily concerned with regulations which can have a profound effect on their interests. They believe that this case raises important questions as to the outer limits of the Takings Clause and the

consequences of going beyond them. It presents an opportunity for this Court to hold that the deprivation of all economically viable use of private property, even when it is a consequence of a concededly bona fide exercise of the police power, may not be accomplished without just compensation. It is important that governments, and landowners large and small, have clear guidance as to when a regulation can, indeed, go too far.

SUMMARY OF ARGUMENT

This Court has consistently suggested that a land use regulation which denies an owner of property of all economically viable use of it effects a taking of that property compensable under the United States Constitution, without regard to whether that denial also advances the public good. The economically beneficial use of property is a right, not a government benefit. Although subject to

reasonable regulation, it is a right that cannot be fully taken for public use, without just compensation. Even to the extent that the police power creates a "nuisance exception" to the Takings Clause, that exception cannot apply to complete restrictions on use, or, as here, construction of a home.

The regulation in question here did not merely limit or reduce the economically viable use of David Lucas's property. It prohibited *all* economically viable use of it, and compelled it to serve exclusively the purposes of the state. In actual practice, therefore, the effect of the South Carolina Beachfront Management Act does not differ in consequential degree from a direct physical invasion of property.

The erroneous proposition that the police power may trump the Takings Clause in such circumstances is of increasing

significance. As initially conceived, land use controls regulated and restricted the uses to which particular properties could be put, and their effect was distributed relatively evenly across the community. In recent years the scope of traditional land use regulation has evolved dramatically. Today it encompasses a much wider variety of environmental and other legislative objectives. Many of these evolving land use controls are based on the assumption that the most effective way to achieve their objectives is profoundly to limit, or in extreme cases completely to preclude, use of land. In the case where such a regulatory scheme does in fact go so far as to eliminate all economically viable use of land, it simply goes too far.

A determination that the South Carolina Beachfront Management Act has in

this case effected a taking of Mr. Lucas's property without just compensation, however, will neither unleash a deluge of suits, nor significantly hamper the ability of governments to manage land use effectively. This case represents an outer limit, one that amici believe is only infrequently reached, but whose existence must be established.

ARGUMENT

I. THE DENIAL OF ALL RIGHT TO MAKE ECONOMICALLY VIABLE USE OF LAND CONSTITUTES A TAKING FOR WHICH JUST COMPENSATION IS REQUIRED, REGARDLESS OF THE LEGITIMACY OF THE GOVERNMENTAL PURPOSE INVOLVED.

A. A taking of all economically viable use of land is a compensable taking of a fundamental property right.

The Fifth Amendment provides in relevant part that "private property [shall not] be taken for public use, without just compensation." Its objective is to prevent the government from forcing individuals to bear public burdens, which

in all fairness should be borne by the public as a whole. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Takings occur, of course, where there is an actual exercise of the power of eminent domain, or where there has been a physical invasion of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). They can also occur when a regulatory restriction on the use of property is so severe that it effectively conscripts that property for public use. This Court has conceded, however, that it has been unable to establish a set formula for determining whether the exercise of the government's power to regulate the use of property has resulted in a regulatory taking. *See Hodel v. Virginia Surface Mining and Reclamation Ass'n Inc.*, 452 U.S. 264, 295 (1981). But there can be no doubt that the issue is of primary significance in takings jurisprudence, and

this case, which is in lineal descent from previous regulatory takings cases, presents a prime opportunity to bring some order to the regulatory takings area. *See First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987). This case presents a clear example of the devastating effect that regulation can have on the use and value of private property when the government seeks to advance its purposes through land use regulation and thereby denies the owner all, or virtually all, economically viable use of land.

Amici emphasize that the notion that the government can reach with impunity so deeply into the bundle of rights constituting ownership of property as to deny all economically viable use of it,

without paying for the extinction of those rights, threatens the very bedrock notions of private ownership of land to which the Fifth Amendment is addressed. *See Keystone,* 480 U.S. at 511-515 (Rehnquist, J., dissenting.) If this case does not present a regulatory taking, it is difficult to imagine the case that would.

The trial court found that the effect of the South Carolina Beachfront Management Act[1] on David Lucas's property was total. Order of the Court of Common Pleas, ¶6, Appendix to the Petition for Certiorari at page 154-155. In order to avoid finding a taking on these facts, however, the South Carolina Supreme Court was constrained to misread *Keystone* to compel the conclusion that when a state exercises its police power to accomplish a bona fide public purpose, it is insulated

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[1] S.C. Code Ann. § 48-39-10, *et seq.* (Law Co-op. 1990).

from the Takings Clause even when that exercise strips property of all use. *Lucas v. South Carolina Coastal Council*, __ S.C. __, 404 S.E.2d 895 (1991). This would apparently be true whether the police power was addressed to a nuisance, or to any other goal that the legislature might identify.

Amici contend, to the contrary, that this Court has clearly suggested, if not directly held, that a taking occurs when all economically viable use of property has been stripped from it, without regard to the public purposes advanced.

A regulatory taking occurs when the regulation challenged fails substantially to advance a legitimate state interest, *or* when it denies an owner economically viable use of his land. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *see also Hodel*, 452 U.S. at 295-96; *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25

(1986); *Nollan*, 483 U.S. at 834. These requirements are not conjunctive. The first aspect of this test, upon which the South Carolina Court apparently rested its entire analysis, does not stand as a separate basis for the insulation of governmental conduct from the Takings Clause. Indeed, it may fairly be seen only as a "condition precedent" to the exercise of the regulatory power in the first instance, a restatement of the fundamental principle that all regulation must advance a legitimate state interest, and that if it does not, its effect on property is a taking. It has never served as a basis upon which to justify the elimination of all rights in private property except the barest right to possess it, and to exclude others from physical intrusion.

To say that a purpose is lawful, however, is not to justify any means of

accomplishing that purpose, and thus the second element of the regulatory takings test must come into play in the proper case. If the government so diminishes the value of land in advancing its good ends, that the land becomes worthless, then *without more*, it is a taking. While a takings analysis requires consideration of the particular incident of property which has been taken, and some such denials of right may not offend the Takings Clause, when a property owner is left with nothing more than good feeling regarding his land, the Constitution forbids it without payment. This Court has recognized that one of the most fundamental rights inhering in land ownership is the right to make some *economically viable use* of it, when it has been acquired with a bona fide expectation that it can be so used. *See Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 143 (1978) (Rehnquist,

J., dissenting). When the right to use has been stripped from ownership, property has been taken. No public purpose, however legitimate, can accomplish that result unless the costs of it are shared equally by the public.

Were it otherwise, then the fears expressed in Justice Harwell's compelling dissent below would be realized: there would never be a case in which diminution in value could constitute a taking. *Lucas,* __ S.C. at ___, 404 S.E.2d at 905 (Harwell, J., dissenting). It would, indeed, be difficult to say such a thing as a regulatory taking remains a viable concept. But this Court has suggested for more than fifty years that drastic diminution in value, a thing directly and inseparably related to the economically viable uses to which it can be put, can in the proper case effect a taking of property even in the face of the most

compelling exercise of the police power. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).[2]

B. The Court need retain no "nuisance exception" to the Takings Clause, but if it chooses to do so that exception is not controlling here.

Although amici do not believe that this Court need retain any "nuisance exception" to the Takings Clause, a determination that a taking occurs in circumstances such as those presented here would not be inconsistent with the continued existence of such an exception. The government may surely eliminate *some* nuisance uses of property without compensation for the loss of *those* uses.

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[2] In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court assumed because of the posture of that case that the Ordinance in question had taken all use of the Church's property. It concluded that were such denial of all use proved, it would constitute a taking, even if temporary, for which compensation would be required. In this case, the trial court found that all use had been denied the property. It would follow that a taking, temporary or permanent, has occurred.

E.g., Mugler v. State of Kansas, 123 U.S. 623 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). But this hardly leads to the conclusion that because the government may eliminate noxious uses, it may therefore eliminate *all* economically viable uses of property.[3] Such extreme sanction against private use of property in the advancement of a public purpose would not constitute regulation, but proscription worthy of a proconsul. The United States Court of Claims has rejected

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[3] As Amicus Pacific Legal Foundation has aptly noted in its Brief in Support of the Petition for Certiorari, there is a consequential distinction between those cases in which regulation has eliminated a *particular* use of a parcel of property identified as a nuisance (*see Mugler* and *Hadacheck, infra*, text accompanying this note; *See also Miller v. Schoene*, 276 U.S. 272 (1928)), and those situations in which regulation has eliminated *all* economically viable use of the property for any private purpose. *See* Brief in Support on Behalf of the Pacific Legal Foundation, at 6-12. *Compare Mugler*, (prohibition of the use of property as a brewery not a taking) *with Curtin v. Benson*, 222 U.S. 78 (1911) (prohibition on use of national park lands for grazing a taking). Presumably the property on which "nuisance uses" once existed could yet be put to other lawful and valuable use. Mr. Lucas's property plainly cannot be put to any other lawful uses, so long as it chances to remain adjacent to the Atlantic Ocean.

similar unwarranted extension of the nuisance exception, on the grounds that, if accepted, the argument "would render the concept of regulatory taking virtually meaningless." *Florida Rock Indus., Inc. v. United States,* 21 Cl. Ct. 161, 167 (1990).

Assuming that there is yet something to the nuisance exception beyond its function as a statement of the unquestioned power of government to abate nuisances, however, amici are concerned with the South Carolina Supreme Court's apparent equation of the exercise of the police power in this case, with the elimination of a nuisance. Taken to its logical extreme, the court's analysis would effectively mean that the construction of homes, offices, and businesses could constitute a public nuisance, if the government chose to say

so.[4] These are, of course, the very uses which constitute the economic lifeblood of amici's membership.[5] If no taking is found on the facts of this case, regulators would be granted license to extend their reach ever further, without the potentially sobering remedy of

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[4] The South Carolina Supreme Court's determination that Mr. Lucas's use of his property for a home site would constitute a nuisance was, of course, based solely upon his failure to contest the legitimacy of the State's purposes in seeking to protect beachfront property. So far as amici are aware no court has ever held that the construction of a home constitutes a nuisance, and we have not yet reached the point where people and the homes that they live in have been declared a form of pollution. In fact, property adjacent to Mr. Lucas already had homes on it which were beyond the reach of the Act. The implausibility of the South Carolina Court's use of the nuisance exception as applied to a single family residential use was aptly discussed by Judge Hall in his dissent in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 173 n.2 (4th Cir. 1991) ("Living in a beach bungalow bears little resemblance to the noxious uses of property the Supreme Court has identified.") *See also Keystone*, 480 U.S. at 511-515 (Rehnquist, J., dissenting) (discussing limitations on the nuisance exception).

[5] Amici do not suggest that the power of the government to address such questions is limited by the Takings Clause. In this case, for example, it is uncontested that the state can forbid the construction of beachfront houses as a legitimate exercise of its governmental powers. The question is whether it may do so at no cost to the public.

compensation for those cases in which they go too far: it would be difficult to define, or even discern, an outer limit on regulatory authority to act without compensation if virtually complete diminution of value by the denial of economically viable uses of property is not a taking.[6]

C. The Beachfront Management Act is similar in effect to an actual possessory invasion by the state.

Mr. Lucas's property has not only been stripped of its private uses. It has been directly conscripted to public use. Under the Beachfront Management Act, no permanent or habitable structure may be

[6] Indeed, if the mere exercise of the police power is sufficient to immunize a regulation from being construed as a taking, then the only challenge that might be levied against such a regulation would be that it did not substantially advance a legitimate public purpose. Given the deference which courts properly give to the exercise of the legislative power in land use matters (*see, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984)) such challenges could be even more difficult to mount than the already difficult task of demonstrating a taking.

placed on the Lucas property.[7] The effect is to compel the property to remain perpetually a part of the pristine South Carolina beachfront, precisely in order to advance the purposes of the Beachfront Management Act.

It is difficult to see how this compelled dedication of property to the services of South Carolina's legislatively-identified purposes, (and to the complete exclusion of any purposes which Mr. Lucas might have in good faith believed he might pursue under the lawful zoning of his land), is consequentially different from an *actual physical invasion* of his property for a public use. Had South Carolina sought to turn Mr. Lucas's lots into a park or a landing field, or to force access for a cable television line, there is no doubt that such impressment

[7] *See Lucas*, __ S.C. at ___, 404 S.E.2d at 896-898.

would have effected a taking. *See Loretto,* 458 U.S. 419 (1982). In *United States v. Causby,* 328 U.S. 256, 261-262 (1946), the Court recognized that if the frequency and altitude of airplane flights prohibited landowners from using their land, their loss would be as complete *as if the United States had entered the land and taken exclusive possession of it,* for the government had "exercise[d] complete dominion and control over the surface of the land[.]" The same is true here.

In all such cases, the government has compelled privately-owned land to be put to the direct attainment of a public end. Here, it has been applied to the state's ecological and tourism-related goals. No consequentially different result obtains than if the State had formally condemned Mr. Lucas's land, and assigned it to an agency for the purposes of the Beachfront

Management Act. *See Penn Central Transp. Co.,* 438 U.S. at 123 n.25.[8]

II. A DETERMINATION THAT A COMPENSABLE TAKING HAS OCCURRED IN THIS CASE IS POTENTIALLY CONSEQUENTIAL TO OTHER LAND USE REGULATIONS AS THEY MAY BE APPLIED TO INDIVIDUAL LANDOWNERS.

A. Land use regulation has evolved in recent years to include schemes which operate to preclude all use of land in some circumstances.

Land use management statutes, ordinances and regulations are, of course, the classic examples of the kinds of regulatory impositions which may, in furtherance of the public welfare, impose significant economic burdens on landowners. In most cases, however, the burden on the landowner will be without constitutional effect. *See Penn Central*

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[8] The similarity between actual physical invasions and regulatory invasions has been often addressed before, and this Court has "never embraced the proposition that a 'taking' can never occur unless the government has transferred physical control over a portion of a parcel." *Penn Central Transp. Co.,* 438 U.S. at 123 n.25.

Transp. Co., 438 U.S. at 139-40 (Rehnquist, J. dissenting).

Historically, however, zoning enabling acts permitted governments only to regulate and restrict uses of property. Under traditional zoning enabling legislation, uses are categorized, land is divided into zones or districts in which those uses are permitted, and either general or specific regulations are imposed on the conduct of the uses permitted. The value of property can be dramatically enhanced, or reduced, by the requirements of such ordinances, and even though such schemes are unquestionably constitutional on their face (*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)), it has long been plain that, as a matter of due process at least, they can be unconstitutional as applied to particular properties. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

Over the past two decades, however, land use regulation has changed significantly as environmental and other preservationist concerns have loomed ever larger. In many new land use regulatory schemes, the principal thrust of the regulatory approach is not simply the regulation of land use, but its elimination: the public purposes which are advanced are deemed best advanced by the preservation of some or all of a parcel undisturbed.[9]

As but one example of this kind of regulatory approach, one that directly affects amici, landowners in certain Tidewater Virginia jurisdictions have been subject since 1988 to the provisions of the Chesapeake Bay Preservation Act, Va.

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[9] *See* Burton, *Predatory Municipal Zoning Practices: Changing the Principles of Constitutionality in the Wake of the "Takings Trilogy"*, 44 Ark. L. Rev. 65, 72 (1991) (discussing current government regulatory strategy in the context of the Fifth Amendment).

Code Ann. § 10.1-2100 *et seq.* (Michie 1989), and Final Regulations, VR 173-02-01, 7:5 Va. Regs. Reg. 699-712, December 3, 1990. Under the requirements of the Bay Act, certain localities are required to adopt local ordinances conforming to state regulatory requirements for the reduction of non-point source pollution escaping into the Chesapeake Bay, to protect and enhance the quality of water in the Bay. The regulatory goals and objectives of the Act are thus similar to those of the South Carolina Beachfront Management Act.[10]

The primary land use mechanism employed to advance the goals of the Virginia Bay Act is a virtually complete prohibition on the use of properties

[10] In addition to the Bay Act, Virginia has its own Coastal Primary Sand Dune Protection Act (Va. Code Ann. § 62.1-13.21, *et seq.* (1987 & Supp. 1991)), that operates much as does the South Carolina Act with specific regard to sand dune erosion.

located within certain identified "Resource Protection Areas" (RPAs), and within a 100 foot undisturbed buffer surrounding those areas. Va. Code Ann. § 10.1-2107; VR 173-02-01 § 3.2 (B) (5), § 4.3.[11] No uses are permitted in RPAs or their buffer zones except "water-dependent facilities", and under the provisions of the regulations it is plain that in many cases there will be, in fact, *no* uses which can be made of property subject to these requirements.[12] There will almost

[11] Resource Protection Areas, or RPAs, consist of tidal wetlands, non-tidal wetlands connected by surface flow and contiguous to tidal wetlands or tributary streams, tidal shores, and a 100 foot buffer zone located adjacent to and landward of each of these components, and along both sides of a tributary stream. VR 173-02-01 § 3.2 (B) (1-5).

[12] A "water-dependent facility" is a development of land that cannot exist outside of an RPA, and must be located on the shoreline by reason of the intrinsic nature of its operation. Such uses include, but are not limited to, ports, intake and outfall structures of power plants, water and sewer treatment plants, and storm sewers, marinas and other boat-docking structures, beaches and the like, and fisheries and other marine resources facilities. VR 173-02-01 § 1.4. In many cases, of course, permission to make a "water-dependent use of, say, a non-tidal wetland, is simply impossible

certainly arise circumstances in which the case-specific application of these requirements will completely restrict the use of an entire parcel of land.

In some measure, of course, the restrictions on use to be found in the Chesapeake Bay Act, the South Carolina Beachfront Management Act, and similar enactments nationwide, resemble ordinary setbacks long recognized as legitimate exercises of the zoning power. The consequential difference between setbacks and the features of these new regulatory schemes, however, is that while the former relate to buffers measured from the outer perimeter of a discrete parcel of property, reservations of property under such statutes as the Chesapeake Bay Act know no limitation. They are dependent not upon property boundaries, but upon the

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even in theory.

existence or nonexistence of natural features. Such restrictions on use possess, therefore, the potential for precluding the economically viable use of property otherwise useable under a traditional zoning scheme, in a way that setbacks customarily do not. To the extent that such regulations work the kind of result that has occurred in this case, they effect a taking as surely as the Beachfront Management Act has on Mr. Lucas's land.

B. A state's ability to administer programs of land use management would not be adversely affected by a determination that Mr. Lucas's property was taken, because this case represents the outer limit of regulatory power.

Amici do not suggest that land use regulation which seeks to achieve ends not originally contemplated by traditional zoning ordinances, or which seek to protect the environment or advance preservationist policies, are in any sense

facially infirm. In the vast majority of cases, the Takings Clause is not implicated by even serious diminution in value of land. Land use ordinances possess constitutional demon seed only when, as here, they operate to deny a landowner of all or virtually all economically viable use of his land.

A decision in favor of Mr. Lucas will not toll the death knell of land use regulation, traditional or innovative, and a state's authority to protect the environment through appropriately tailored regulation will not be emasculated thereby. But the effect on the individual landowner can be so severe that the public should in fairness bear the cost of that effect.

CONCLUSION

The amici respectfully request that this Court reverse the judgment of the Supreme Court of South Carolina.

Respectfully Submitted,

National Association of Industrial and Office Parks, Inc., Northern Virginia Chapter, and the Northern Virginia Building Industry Association, Inc.

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